

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARTICO MULDROW,
Petitioner.

No. 2 CA-CR 2015-0452-PR
Filed February 11, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR1999014482
The Honorable Teresa A. Sanders, Judge

REVIEW GRANTED; RELIEF DENIED

Martico Muldrow, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Martico Muldrow seeks review of the trial court's order denying his successive proceeding for post-conviction relief under Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Muldrow has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Muldrow was convicted of first-degree felony murder. The trial court imposed a life sentence without the possibility of release for twenty-five years. Muldrow's conviction and sentence were affirmed on appeal. *State v. Muldrow*, No. 1 CA-CR 02-0950 (memorandum decision filed May 25, 2004). Muldrow initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the matter and was "unable to find a meritorious issue" to raise in a Rule 32 proceeding. In a supplemental pro se petition, however, Muldrow raised various claims of ineffective assistance of trial and appellate counsel and asserted a few claims of trial error. The trial court summarily denied relief. This court denied review of his subsequent petition for review in May 2006.

¶3 In January 2014, Muldrow filed a petition for a writ of habeas corpus, raising claims of prosecutorial misconduct and ineffective assistance of trial, appellate, and Rule 32 counsel, all related to what he claimed was newly discovered evidence "that was material to the credibility of a state's witness," an investigating officer. The trial court properly deemed the petition one for post-conviction relief. *See* Ariz. R. Crim. P. 32.3. It dismissed the notice

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because Muldrow's ineffective assistance and prosecutorial misconduct claims failed "to state a claim for which relief can be granted in an untimely Rule 32 Proceeding." The court also denied his motion for reconsideration of that ruling.

¶4 On review Muldrow argues the trial court abused its discretion in dismissing the proceeding. He contends the court's conclusion that he was not entitled to relief in this untimely, successive proceeding was erroneous because he established a colorable claim of newly discovered evidence.¹ In his petition, Muldrow couched his claim as one of prosecutorial misconduct, primarily as a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The court correctly rejected that claim as precluded. In his motion for reconsideration, however, Muldrow argued the evidence met the standard for newly discovered evidence. The court denied the motion without comment. Although the court was entitled to deem the claim waived insofar as it was raised for the first time in a motion for reconsideration, *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991), a claim of newly discovered evidence may be raised in an untimely proceeding, *see* Ariz. R. Crim. P. 32.4(a); 32.1(e).

¶5 To establish a claim of newly discovered evidence, a defendant must show the evidence existed at the time of trial, but was discovered afterwards, the defendant was diligent in discovering the facts, and, the evidence may not be "solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such

¹Muldrow also states he is "actually innocent" in his petition for review, but does not develop such a claim pursuant to Rule 32.1(h), nor did he do so below. We therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted" and "specific references to the record"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

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that the evidence probably would have changed the verdict or sentence.” Ariz. R. Crim. P. 32.1(e).

¶6 Muldrow’s proposed evidence consisted of accounts of misconduct by an investigating detective, which are reported in the appendix to the Ninth Circuit’s decision in *Milke v. Ryan*, 711 F.3d 998, 1020 (9th Cir. 2013), entitled “Detective Armando Saldate, Jr.’s Misconduct.” In *Milke*, Saldate had provided the only evidence linking the defendant to the murder of her son. *Id.* at 1022. In this case, however, Saldate swore in an affidavit in support of a warrant to obtain bodily fluids and hair from a third party, Ronald Moore, that Moore “had admitted to [a] confidential source that he was responsible for the murder” of the victim. Before trial, Muldrow had proposed to present a third-party culpability defense, and the state moved to preclude such evidence. Multiple hearings were held on the issue, and Saldate testified that he could not remember who the confidential source had been. Evidence also showed that Moore was excluded as the source of pubic hair found on the victim and his fingerprints did not match prints taken at the scene. The trial court ultimately granted the state’s motion, concluding the statement was not sufficiently trustworthy to be admitted.

¶7 Muldrow, who states that he only recently became aware of the *Milke* decision, is only entitled to relief if the evidence “was of critical significance at trial such that the evidence probably would have changed the verdict.” Ariz. R. Crim. P. 32.1(e). Muldrow contends that if the state had disclosed Saldate’s personnel file pursuant to its *Brady* obligation, Saldate’s pattern of lying and misconduct would have made the trial court view the detective’s testimony more skeptically and may have resulted in pretrial rulings more favorable to his third-party defense. Muldrow’s general arguments are not insubstantial, especially as they pertain to exculpatory evidence. *See generally*, Catherine Hancock, *Reflections on the Brady Violations in Milke v. Ryan: Taking Account of Risk Factors for Wrongful Conviction*, 38 N.Y.U. Rev. L. & Soc. Change 437, 464 (2014) (retrospective doubts about reliability of rogue officer can infect many prosecutions). In this case, however, we cannot say evidence of Saldate’s misconduct would have been of critical significance sufficient to change the verdict.

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¶8 As described above, Saldate’s credibility was at issue in relation to the motion to preclude evidence of third-party culpability. Impeaching Saldate with his history of lying in other cases may have been helpful to Muldrow in establishing bad faith in regard to his and the state’s failure to record the identity of the confidential informant and in attempting to further bolster the reliability of Moore’s confession by questioning directly the person to whom he had confessed. But, in contrast, Saldate’s history of dishonesty would also have undermined his testimony that the confession had taken place at all, calling into question whether the statement was admissible under the standard set forth in *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 317 (1988), as understood at the time of the hearings in this case or as later clarified by our supreme court in *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002).² Thus, we cannot say that the evidence probably would have changed the outcome of the proceeding. The court therefore did not abuse its discretion in denying his petition insofar as it raised a claim of newly discovered evidence. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court’s ruling if result was legally correct for any reason).

¶9 To the extent Muldrow also claims the trial court erred in denying relief on his claims of prosecutorial misconduct and ineffective assistance of counsel, we disagree. The court correctly found such claims, which arise pursuant to Rule 32.1(a), precluded and barred as untimely. *See* Ariz. R. Crim. P. 32.2(a)(3), (b); 32.4(a).

¶10 Therefore, although we grant the petition for review, we deny relief.

²In *Gibson*, our supreme court explained that although some courts had treated its decision in *Fulminante* as “a special standard or test of admissibility” in the context of third-party culpability, “[t]he appropriate analysis is found in Rules 401, 402, and 403, Arizona Rules of Evidence.” *Gibson*, 202 Ariz. 321, ¶¶ 9, 12, 44 P.3d at 1003.